APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 9, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1997

Argued: January 9, 1998 Decided: July 9, 1998

Docket Nos. 97-7801, -7839

IRENE HALLIGAN, as Executrix
of the Estate of Theodore H. Halligan,

Petitioner-Appellant,

—against—

PIPER JAFFRAY, INC., and MARVIN GEISNESS,

Respondents-Appellees.

Before:

FEINBERG and KEARSE, *Circuit Judges*,
and PARKER*, *District Judge*.

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* Hon. Barrington D. Parker, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

Appeal from orders of the United States District Court for the Southern District of New York, Kimba M. Wood, J., confirming an arbitration award in favor of respondents on petitioner's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and other claims, which were submitted to arbitration pursuant to a pre-dispute agreement to arbitrate imposed as a condition of employment, and dismissing as barred by res judicata a federal complaint based on the same underlying facts. Held, panel concludes that because arbitrators' award was in "manifest disregard" of the law or the evidence or both, it is vacated.

Reversed and remanded.

KATHLEEN O'CONNELL, New York, NY (Murphy & O'Connell, of Counsel), *for Petitioner-Appellant.*

JILL L. ROSENBERG, New York, NY (Orrick, Herrington & Sutcliffe LLP, Robert C. Whitman, of Counsel), *for Respondents-Appellees.*

Fredda L. Plesser, Vice President & Associate General Counsel, Securities Industry Association, New York, NY, *for Respondents-Appellees as Amicus Curiae.*

C. Gregory Stewart, General Counsel, J. Ray Terry, Jr. Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, Robert J. Gregory, Attorney,

Appendix A

Equal Employment Opportunity Commission, Washington, DC, *as Amicus Curiae.*

FEINBERG, Circuit Judge:

Irene Halligan (Mrs. Halligan), as executrix for the Estate of Theodore Halligan (Halligan), appeals from orders dated April 14, June 10 and June 16, 1997 of the United States District Court for the Southern District of New York, Kimba M. Wood, J. The orders of April 14 and June 10 respectively refused to vacate and then confirmed an arbitration award in favor of defendants Piper Jaffray, Inc. (Piper) and Marvin Geisness, Halligan's sales partner, on Halligan's claim, among others, that defendants had terminated his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The order of June 16, 1997, dismissed as barred by res judicata Mrs. Halligan's federal complaint based on the same underlying facts as the ADEA claim in arbitration.

Mrs. Halligan argues, among other things, that the award reflected "manifest disregard" of the law. We agree, and accordingly reverse the orders of the district court.

I. Background

Halligan was hired by Piper in 1973 as a salesman of equity investments to financial institutions. As a condition of employment, Halligan was required by the industry self-regulatory organization, the National Association of Securities Dealers (NASD), to sign a standard form (U-4) containing an agreement to arbitrate any future disputes.[1] In 1988, Tad

[1] Halligan was required to agree "to arbitrate any dispute . . . that may arise between me and my firm . . . required to be arbitrated under the rules, con-

Piper succeeded his father as CEO of Piper. Mrs. Halligan contends that thereafter Halligan was forced from his job in December 1992 by Tad Piper and Halligan's supervisor, Bruce Huber, because of his age and despite his continuing high performance.

In October 1993, Halligan submitted his ADEA claim, along with other claims, to arbitration before a panel of NASD arbitrators. Before he could complete his own redirect testimony, however, his health deteriorated and in early 1995 the arbitrators were advised that Halligan was unable to testify further. By stipulation, the arbitrators struck his redirect testimony from the record and continued the proceeding. Halligan's direct testimony had been subject to cross-examination and was not stricken. After his death, Mrs. Halligan continued the arbitration.

During the arbitration hearings, Halligan presented the arbitrators with very strong evidence of age-based discrimination. Piper for its part has conceded throughout that Halligan was "basically qualified." Piper principally contended that Halligan had chosen to retire; it also argued that performance and health issues justified its conduct.

Before leaving Piper in December 1992, Halligan was making nearly $500,000 per year. He ranked fifth out of 25 institutional salesmen. He was ranked first from 1987 through 1991, and had consistently been among Piper's top salesmen. He testified as to repeated discriminatory statements by Tad Piper, Huber, and Halligan's younger partner Geisness. For example, Halligan testified that at a meeting on

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stitutions, or by-laws of [the NASD.]" When Halligan signed his U-4, section 1 of the NASD's Code of Arbitration Procedure allowed for the submission of "any dispute . . . arising out of or in connection with the business of any member . . . between or among members and public customers, or others . . . ." Section 8 required submission of "[a]ny dispute . . . eligible for submission . . . between . . . members and/or associated persons . . . arising in connection with the business of such member(s) . . . ."

August 27, 1992, Tad Piper told him "you're too old. Our clients are young and they want young salesmen," and Huber told him "we want you out of here quickly." Tad Piper and Huber denied making such remarks. Halligan also testified that during a telephone conversation on September 10, 1992, Huber told him that "we want you out of Piper Jaffray by the end of the year," and that "if you don't leave, we will fire you." Halligan testified that he then asked if he could stay for the remainder of the year, and that Huber agreed. Huber testified that during the conversation, Halligan asked him what he should do. He testified that he advised Halligan to resign, and that Halligan agreed "then that's what it will be." Huber admitted that Halligan had never requested his advice before. There were no witnesses to this conversation.

Halligan's evidence also included his notes of this and other conversations, a witness who testified that he had seen Halligan recording notes, and several witnesses who heard Halligan say he was being "fired." In addition, Halligan called many witnesses who testified that Piper personnel had expressed their intention to oust Halligan on account of his age. John Dockendorff, a former client and later competitor, testified that in 1989 (the year after Tad Piper became CEO) Huber attempted to recruit him (in Dockendorff's words) to "learn as much as I could about [Halligan's] accounts," because Halligan "would get put out to pasture because he was getting old." All Piper personnel denied having made such statements, although their testimony was occasionally inconsistent or ambiguous. Halligan presented testimonials from current and former clients and colleagues who testified that Halligan was among the best in his field. Halligan refused to provide Piper with a letter of resignation. He also refused an offer of a retirement party and refused to write a letter to his clients saying he was retiring. On November 23, 1992, Halligan's lawyer sent a letter threatening suit if Hal-

ligan was terminated. In addition, Halligan testified that he approached Huber in November and asked him if he could keep his job. Huber replied that plans had already been made to close the New York office. Apparently, those plans consisted simply of termination notices to two support staff. Halligan's accounts were thereafter assigned to two younger men. Halligan testified that he unsuccessfully looked for a new job after leaving Piper.

Piper principally argued that it gave Halligan the options of retiring, agreeing to a new percentage split with Geisness or being assigned a new group of accounts, and that Halligan agreed to retire in the phone conversation on September 10, 1992. Piper also contended its conduct was justified by concerns over Halligan's performance and health. Halligan had surgery for oral cancer twice (in 1990 and 1991), but returned to work each time after approximately two weeks. Halligan conceded that the surgeries had caused slight speech impairment, but offered various witnesses who testified that Halligan was always able to perform his job. Piper discounted Halligan's objective evidence of performance, arguing that Halligan's accounts had more inherent potential and that the rankings failed to reflect the contributions that other employees had made to Halligan's success. In addition, Huber testified that he thought Halligan needed to develop accounts more effectively (although Huber was unable to identify specific accounts) and use the firm's research and other resources more efficiently. Piper submitted various memoranda related to these concerns, and offered testimony by various witnesses who, with the exception of one employee who had recently retired, were all Piper officers or major shareholders. Piper discounted the testimonials in favor of Halligan, arguing that it was not his clients and former colleagues whose expectations Halligan had to satisfy.

Huber was the only witness testifying that in the September 10th telephone conversation Halligan accepted the "option" of retirement, and Huber was contradicted as to key elements of his testimony by other Piper witnesses. For example, Huber testified that Geisness was not informed of the August 27 meeting before it took place, but both Tad Piper and Geisness testified to the contrary. Geisness testified that when he discussed this meeting with Huber, he asked Huber to keep the New York office open.

In March 1996, after extensive hearings, the arbitrators rendered a written award setting forth the claims and defenses of each party, and denying any relief to the Halligans. The award did not contain any explanation or rationale for the result.

In June 1996, Mrs. Halligan petitioned the district court to vacate the award under § 10(a) of the Federal Arbitration Act (FAA), 9 U.S.C. § 10(a). She argued, among other things, that given the very strong evidence of discrimination and the clear description of the applicable law presented to the arbitrators, the award reflected manifest disregard of the law.

Piper agreed that the law governing the claim was generally not disputed by the parties, but argued in response that it was not the function of the court to review the merits of the decision and that the arbitrators' award was supported by the evidence Piper presented. Piper cross-petitioned the district court to confirm the award.

The district judge refused to vacate the award. She stated in the order of April 14, 1997 that

> [h]ere, the determination of what constitutes `direct evidence' [of discrimination] . . . is a difficult one to make. In addition, the record . . . does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof. . . . [T]he Panel was

> faced with the task of evaluating conflicting witness testimony, and where it did not issue a written opinion, I cannot conclude that the panel did in fact disregard the parties' burdens of proof. . . . [C]rediting one witness over another does not constitute manifest disregard of the law [and] this Court's role is not to second-guess the fact-finding done by the Panel. Because there is factual as well as legal support for the Panel's ultimate conclusion, I determine that the Panel did not manifestly disregard the law . . . . (internal citations and footnote omitted).

The judge granted Piper's cross-petition to confirm the award in her order of June 10, 1997.

In addition to petitioning to vacate the arbitration award, in October 1996 Mrs. Halligan had filed a complaint in the district court based upon the same underlying facts and raising the ADEA claim. Piper moved to dismiss this complaint on grounds of res judicata, and the district court granted the motion in its order dated June 16, 1997.

II. Analysis

Mrs. Halligan argues in this court, among other things, that the arbitrators' award reflected manifest disregard of the law. Piper argues in response, among other things, that it is not the function of this court to reassess the evidence or make judgments about witness credibility and that the district court was able to adequately review the award—even in the absence of a written explanation—by inferring from the record grounds that support the arbitrators' award. We have also received amicus briefs from the Equal Employment Opportunity Commission (EEOC) and the Securities Industry Association (SIA).

Appendix A

A. Arbitrability of ADEA Claims

This appeal arises in a context that has become increasingly important in the federal courts. The use of arbitration as a device to resolve disputes has received strong judicial support in the last few decades, both in labor management disputes and also in disputes involving ordinary commercial contracts. See e.g., AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986) (labor dispute); Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983) (commercial dispute). It has been made clear by the Supreme Court, this court and other courts that the ancient judicial hostility to arbitration is a thing of the past. See e.g., Moses H. Cone Memorial Hosp., 460 U.S. at 24; Leadertex v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 24-25 (2d Cir. 1995); Finegold, Alexander + Assocs., Inc. v. Setty & Assocs., Ltd., 81 F.3d 206, 207-08 (D.C. Cir. 1996); José A. Cabranes, Arbitration and U.S. Courts—Balancing Their Strengths, A.D.R. Currents, Fall 1997, at 1. However, one aspect of the increased use of arbitration has recently engendered greater scrutiny and controversy—the use of mandatory pre-dispute arbitration agreements to resolve statutory claims of employment discrimination. Such agreements require an individual, as a condition of employment, to agree in advance to arbitration of future claims alleging violation of a statute prohibiting discrimination in employment. The arbitration award here arose out of such an agreement.[2]

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[2] Piper contends that Halligan *voluntarily* submitted his claim to arbitration. Halligan had, however, been required to agree to an extremely broad arbitration clause, see footnote 1, which established a presumption of arbitrability that could only be overcome if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Associated Brick Mason Contractors of Greater New York, Inc. v. Harrington, 820 F.2d 31, 35 (2d Cir. 1987) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986)). In light of our current caselaw, Halligan was correct in considering himself bound to arbitrate.

Appendix A

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court found for the first time that an employee could be held to his pre-dispute agreement to arbitrate his claim under the ADEA, the same statute upon which the Halligans rely. The Court relied on a line of cases, commencing with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), that held enforceable pre-dispute arbitration agreements as applied to claims under various federal statutes, including the securities acts and RICO. In *Mitsubishi*, the Court had enforced an agreement between two corporations to arbitrate claims under the federal antitrust laws, on the premise that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id., 473 U.S. at 628. In *Gilmer*, which quoted this language, the Court held that an employee, who had been required to sign a form containing an agreement to arbitrate as a condition of employment, had not shown that Congress intended to preclude the waiver of a judicial forum for ADEA claims. 500 U.S. at 26. Again quoting from *Mitsubishi*, the Court stated that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28.

The Court also noted in *Gilmer* the contention "that judicial review of arbitration decisions is too limited" to adequately protect statutory rights. Id. at 32 n.4. Quoting from Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987), the Court rejected that argument, stating that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Gilmer*, 500 U.S. at 32 n.4. The employee in *Gilmer* also generally chal-

lenged the procedures usually employed in arbitration. The Court stated that these "claimed procedural inadequacies" are "best left for resolution in specific cases." Id. at 33.

B. Standard of Review of Award

The parties agree that review of arbitration awards is generally governed by the FAA. The relevant statutory language is reproduced in the margin.[3] In addition, relying on an observation by the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), this court has also recognized that an arbitration award may be vacated if it is in "manifest disregard of the law." See e.g., Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). We have also pointed out, however, that the reach of the doctrine is "severely limited." Government of India v. Cargill, Inc., 867 F.2d 130, 133 (2d Cir. 1989). Indeed, we have cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law." Bobker, 808 F.2d at 933. We have further noted that to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and

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[3] The FAA provides that an award may be vacated where

(1) . . . the award was procured by corruption, fraud or undue means[.]

(2) . . . there was evident partiality or corruption in the arbitrators . . . [.]

(3) . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced [; or]

(4) . . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the . . . matter submitted was not made.

9 U.S.C. § 10(a).

(2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997), cert. denied, 118 S.Ct. 1695 (1998).[4]

This case also arises in the context of other developments. In the aftermath of *Gilmer*, as we have already noted, mandatory binding arbitration of employment discrimination disputes as a condition of employment has caused increased controversy. Attention has focused on, among other things, whether additional procedural requirements are necessary to ensure that employees will be able, in the words of *Gilmer*, to "effectively . . . vindicate" their statutory rights in arbitration. 500 U.S. at 28. See e.g., Commission on the Future of Worker-Management Relations, Report and Recommendations (1994) (Dunlop Report); EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915.002 (July 10, 1997); Samuel Estreicher, Predispute Agreements to Arbitrate Statutory Employment Claims, 72 N.Y.U. L. Rev. 1344, 1352-59 (1997). The major independent arbitration agencies have formulated due process standards for the adjudication of these disputes. See e.g., National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems (Statement adopted May 21, 1997); American Arbitration Association, National Rules for the Resolution of Employment Disputes (1996, as amended 1997); JAMS/ENDISPUTE, Six Principles of Neutrality and Fairness for Employment Dispute Resolution Practice (1995).

Industry self-regulatory organizations (SRO's) like the NASD have been singled out for criticism because, among

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[4] See generally, Michael P. O'Mullan, Note, Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard, 64 Fordham L. Rev. 1121 (1995).

other reasons, the role they play in determining the pool of available arbitrators and selecting the arbitrators who will hear a particular discrimination claim against a member firm of the SRO calls into question the impartiality of the arbitrators selected. See e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Civ. No. 96-12267, 1998 WL 81907, at *16-*21 (D. Mass. Jan. 26, 1998) (appeal pending) (discussing possibility of institutional bias due to industry influence over arbitration before SRO's and, in particular, under the rules of the New York Stock Exchange); George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners, 1 U. Pa. J. Lab. & Emp. L. 175, 183 (forthcoming 1998).

Mrs. Halligan argues that the NASD has undue influence here. Under the NASD's Code of Arbitration Procedure, a pool of arbitrators "from within and without the securities industry" is selected by a National Arbitration Committee, a body appointed annually by the Board of Governors "of such size and composition, including representation from the public at large, as [the Board] shall deem appropriate and in the public interest." NASD Code of Arbitration Procedure § 2. The composition of particular panels is then determined by a Director of Arbitration who is also appointed by the Board of Governors, and the Director has discretion to allow the Executive Committee of the National Arbitration Committee to appoint the panel for a case directly. Id. at §§ 3-4. Each party is allowed a single peremptory challenge as of right. Id. at § 22.

In response to criticism, the NASD has recently filed a proposed rule change with the Securities and Exchange Commission under which its member organizations would not be required to condition employment on an employee's agreement to arbitrate these disputes. Notice of Filing of Proposed Change by the NASD Relating to the Arbitration of Employ-

ment Discrimination Claims, 62 F.R. 66164 (December 17, 1997). The filing promises further unspecified rule changes to enhance the fairness of the procedures applied by the NASD in this context. There have also been bills introduced in Congress that would prevent pre-dispute waiver of a judicial forum. See the Civil Rights Procedures Protection Act of 1997, S. 63, H.R. 983, 105th Cong. (1997).

In addition, the federal courts have shown growing concern over the problem. For example, the D.C. Circuit has recently emphasized the necessity of adequate review in enforcing a mandatory, pre-dispute agreement to arbitrate Title VII discrimination claims. Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997). Similarly, in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), the Ninth Circuit held that waivers of a judicial forum for statutory employment discrimination claims must be "knowing and voluntary" and refused to enforce an agreement to arbitrate that did not meet that standard. See also Chisolm v. Kidder, Peabody Asset Management, 966 F. Supp. 218, 225-26 (S.D.N.Y. 1997) (appeal pending) (thorough review of relevant authorities); Rosenberg, 1998 WL 81907 (holding employee could not be compelled to arbitrate her claim given questions as to the voluntary nature of her agreement to arbitrate and procedural deficiencies in the proposed arbitral forum). Given our disposition of this appeal on the merits of the award issued in this case, with one exception discussed below we do not address Mrs. Halligan's generalized challenge to arbitrations conducted under the aegis of the NASD.

C. Application of Standard of Review

We turn now to review of the district court's decision in this case. Mrs. Halligan argued in the district court and repeats to us that the arbitration award reflected manifest disregard of the law. Mrs. Halligan makes a strong case for that

proposition. Quite simply, Halligan presented overwhelming evidence that Piper's conduct after Tad Piper became CEO was motivated by age discrimination. Halligan testified to repeated discriminatory statements, and offered contemporaneous notes supporting his version of events, which were in turn backed by the testimony of a witness who saw him making notes. Halligan also presented the testimony of numerous other witnesses who testified that Piper personnel admitted that the company wanted Halligan out. Halligan presented powerful evidence of his performance, in the form of quantitative sales rankings and relevant witness testimony. Notwithstanding Piper's testimony as to Halligan's performance and health, Piper conceded before the arbitrators—and continues to do so—that Halligan's continuing performance was not so unsatisfactory as to justify discharge. Indeed, its principal argument has been that Halligan retired voluntarily. Halligan also made a very strong showing that he did not choose the "option" of quitting but was fired. The strength of Halligan's showing of discriminatory motive is most probative of whether Piper took discriminatory action, i.e., fired him. In addition, the circumstantial evidence surrounding his departure, e.g., his statements to various witnesses about his being "fired," his refusal to write to his clients announcing his "resignation," his retention of counsel, is consistent only with a finding that Halligan was pushed out of his job.

Moreover, this is not a case like *DiRussa* where we refused to find "manifest disregard" because DiRussa had not sufficiently brought the governing law to the attention of the arbitrators. There is no such problem here. The record indicates that counsel for both parties generally agreed on the applicable law (and still do on appeal), and explained it to the arbitrators. It is true that the district court stated that the record "does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof." If this

observation meant that counsel did not explain the law sufficiently to the arbitrators, it is not correct. Perhaps the district court meant that the arbitrators did not state that they were ignoring the relevant standards for burdens of proof. That is true, but we doubt whether even under a strict construction of the meaning of manifest disregard, it is necessary for arbitrators to state that they are deliberately ignoring the law. See DeGaetano v. Smith Barney, Inc., 983 F.Supp. 459, 463 (S.D.N.Y. 1997).

In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both. Moreover, the arbitrators did not explain their award.[5] It is true that we have stated repeatedly that arbitrators have no obligation to do so. E.g., Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972); Koch Oil, S.A. v. Transocean Gulf Oil Corp., 751 F.2d 551, 554 (2d Cir. 1985); Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 704 (2d Cir. 1978). But in *Gilmer*, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration. 500 U.S. at 26, 28. This case puts those assumptions to the test. The Court also stated in *Gilmer* that "claimed procedural inadequacies" in arbitration "are best left for resolution in specific cases," 500 U.S. at 33. At least in the circumstances here, we believe that when a reviewing court is inclined to

[5] A leading expert in the field has asserted that NASD arbitrators are expressly advised that they are not required to follow the law and need not give reasons for their determination. Nicolau, supra, p. 17, at 183.

hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

Piper argues that the arbitration panel resolved the case in accordance with substantive ADEA law; for example, it credited Piper's witnesses rather than Halligan's. Had the arbitrators offered that explanation of the award, on this record it would have been extremely hard to accept—but they did not do even that. There is some authority permitting discretionary remand of a case to the arbitrators for a written explanation of their award. Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985) (per curiam). But in view of the entire record here, we see no persuasive reason for doing so.

We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.

For the reasons stated above, we reverse the district court's orders of April 14, 1997 and June 10, 1997 respectively refusing to vacate and then confirming the award. We also reverse the order of June 16, 1997 dismissing the complaint filed in the district court by Mrs. Halligan because there is no enforceable award to bar the suit on res judicata principles. We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 7468 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Plaintiff,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Defendants.

OPINION & ORDER

WOOD, U.S.D.J.

Plaintiff Irene Halligan ("Plaintiff") initiated this action under the Age Discrimination in Employment Act (the "ADEA"), alleging that defendants Piper Jaffray, Inc. ("Piper Jaffray") and Marvin Geisness (collectively, "Defendants") discriminated against her late husband, Theodore Halligan ("Mr. Halligan"), a former employee of Piper Jaffray. Defendants have moved to dismiss the complaint in this action, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). This Court has already entered judgment confirming an award in arbitration based upon the same claim that is the subject of the instant lawsuit;

accordingly, under the doctrine of res judicata, I now dismiss this complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

The shared factual background of this action and the related action before this Court, *Halligan v. Piper Jaffray, Inc. and Marvin Geisness*, No. 96 Civ. 4472, is set out more fully in the Court's Opinion and Order in the latter case dated April 14, 1997, with which I assume familiarity. In brief, Mr. Halligan alleged that his former employer, Piper Jaffray, terminated him in violation of the ADEA and other common law rights. In October of 1993, Mr. Halligan initiated an arbitration proceeding on those claims against Defendants. Mr. Halligan died in October of 1995, before the arbitration had been completed. Plaintiff authorized Mr. Halligan's counsel, now Plaintiff's counsel, to continue with the arbitration. In March of 1995, the arbitration panel issued an award that denied all of Mr. Halligan's claims. Subsequently, in the action to which this case is related, No. 96 Civ. 4472, Plaintiff here (Petitioner in that action) petitioned to vacate the arbitration award; Defendants (Respondents in the related action) cross-petitioned to confirm the award. In an Opinion and Order dated June 10, 1997, this Court confirmed that award, entered judgment for Defendants, and closed the related case.

It is settled in this circuit that the findings of arbitration boards may serve as the basis for res judicata in an action in federal court. *See Khandar v. Elfenbein*, 943 F.2d 244, 244 (2d Cir. 1991) Res judicata bars the re-litigation of the same issues between the same parties after those issues have been resolved by a court of competent jurisdiction. *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992). Where, as here, an arbitration award has been confirmed by a court of competent jurisdiction,

the final entry of judgment by that court gives the award res judicata effect. Plaintiff had a fair opportunity to argue fully Mr. Halligan's ADEA and other claims before the arbitration panel, and res judicata now precludes Plaintiff from bringing the same claim, or any other claim that could have been decided by the arbitration panel, before this Court.

Because Plaintiff's claims are barred by res judicata, I grant defendants' motion to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). I therefore order the Clerk of Court to close this case. Any pending motions are hereby deemed moot.

SO ORDERED:

New York, New York
June 16, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 10, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 4472 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Petitioners,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Respondents.

OPINION & ORDER

WOOD, U.S.D.J.

Petitioner Irene Halligan ("Petitioner") filed a petition to vacate an arbitration award (the "Award") made after an arbitration proceeding brought by her husband, Theodore Halligan ("Mr. Halligan"), against Piper Jaffray, Inc. and Marvin Geisness ("Respondents"), alleging violation of the Age Discrimination in Employment Act and other common law rights. The Award rendered on March 19, 1995, denied all of Mr. Halligan's claims. In an opinion and order dated April 14, 1997, I denied the petition to vacate. Respondents have cross-petitioned to confirm the Award. For the following reasons, I grant Respondents' cross-petition.

Appendix C

I. Analysis

The factual background of this action is fully set forth in my opinion and order of April 14, 1996, with which I assume familiarity. Respondents argue that because no grounds exist to vacate the award, the Court must confirm the Award pursuant to 9 U.S.C. § 9. Petitioner argues that the Court may not confirm the Award for two reasons. First, Petitioner argues that the Court lacks subject matter jurisdiction over Respondents' cross-petition; second, Petitioner argues that Respondents' cross-petition was improperly filed. Because both of those arguments are without merit, as discussed below, I confirm the Award in accordance with 9 U.S.C. § 9.

1. Whether the Court Has Subject Matter Jurisdiction

Petitioner contends that the Court lacks subject matter jurisdiction because (1) there was no agreement between the parties regarding the entry of judgment after an award in arbitration, (2) there was no agreement between the parties to arbitrate disputes, (3) there was no agreement between the parties to arbitrate *employment* disputes, and (4) Petitioner lacked the authority, under New York law, to continue in the arbitration after Mr. Halligan's death. Because I have already determined that the last of these contentions is without merit, *see* April 14, 1997 Opinion and Order at 10-13, I address the remainder of Petitioner's contentions below.

First, Petitioner argues that this Court has no jurisdiction because Mr. Halligan and Respondents did not enter into an agreement providing for entry of judgment after an award in arbitration. Petitioner admits that Mr. Halligan signed a Uniform Submission Agreement with the National Association of

Securities Dealers (the "NASD"), which submitted the dispute between Mr. Halligan and Respondents to arbitration and specifically provided that "a judgment and any interest due thereon may be entered upon [an award] and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment."[1] Petitioner's argument that the Uniform Submission Agreement does not provide for entry of judgment in this case because it was not an agreement between Respondents and Petitioner, but rather, an agreement between the NASD and Petitioner, is without merit. All parties to the arbitration at issue here signed the Uniform Submission Agreement, and all understood that the terms of that Agreement would govern the arbitration.

Second, Petitioner argues that this Court is without jurisdiction because the only agreement to arbitrate that was signed by Mr. Halligan was contained in his 1985 Form U-4, an application for registration as a securities dealer, rather than in a contract between Mr. Halligan and Respondents. However, as Respondents note, the Uniform Submission Agreement

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1. I note that neither party presented the Court with a copy of the Uniform Submission Agreement signed by Mr. Halligan. Respondents attached one copy of that Agreement signed by Marvin Geisness, and one copy of that Agreement signed by a representative of Piper Jaffray, as Exhibit 2 to Jill L. Rosenberg's Affirmation in Opposition to the Petition to Vacate the Award in Arbitration. However, because Petitioner does not dispute that Mr. Halligan signed the Uniform Submission Agreement, *see* Pet. Mem. in Opp. at 3-4, the Court considers the terms of the Uniform Submission Agreement as binding on Mr. Halligan. Petitioner's argument that the Uniform Submission Agreement is not binding on her because the Agreement contains no provision that it is binding upon Mr. Halligan's successors or executors is without merit for the reasons stated in this Court's April 14, 1997 Opinion and Order.

signed by Mr. Halligan and Respondents may serve as the parties' contract to arbitrate. *See, e.g., Mihalakis v. Pacific Brokerage Services, Inc.*, 1991 WL 280236, * 3 (S.D.N.Y. December 23, 1991) (Haight, J.); *Shearson Lehman Brothers, Inc. v. Neurosurgical Associates of Indiana*, 896 F. Supp. 844, 846 n. 2 (S.D. Ind. 1995). Whether or not the parties have an independent agreement to arbitrate disputes, the decision by Mr. Halligan and Respondents each to sign the Uniform Submission Agreement constitutes an independent agreement to arbitrate their dispute.

Finally, Petitioner's argues that because the Uniform Submission Agreement does not provide that the parties arbitrate employment disputes, it cannot constitute the parties' contract to arbitrate. That argument is meritless; again, Petitioner has failed to understand the nature of the Uniform Submission Agreement. The Uniform Submission Agreement, bearing the caption "In the Matter of the Arbitration Between [claimant] Theodore Halligan [and] [respondents] Piper Jaffray Inc. [and] Marvin Geisness," states that the parties "hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration." Although neither party has submitted the attached statement of claim or other attached documents, Petitioner does not allege that there is any dispute between Mr. Halligan and Respondents other than Mr. Halligan's age discrimination in employment claim that was, in fact, the subject of the arbitration. The plain language of the Uniform Submission Agreement indicates that the employment dispute between Mr. Halligan and Respondents — the *only* dispute between those parties — was the subject of the arbitration, and that both Mr. Halligan and Respondents, through the signing

of the Uniform Submission Agreement, agreed to submit that dispute to arbitration. For all of the reasons stated above, Petitioner's argument that the Court does not have subject matter jurisdiction over this action is without merit.

2. Whether the Cross-Petition Was Improperly Filed

Petitioner offers no legal authority to support the proposition that the petition to vacate the Award and the petition to confirm the Award may not be heard in one action. Indeed, Respondents' decision to file its petition to confirm the Award as a cross-petition within the action brought by Petitioner to vacate the Award comports with the principles of judicial economy and efficiency. Courts routinely consider such petitions together. *See, e.g., First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105 (S.D.N.Y. 1994). For that reason, I deny Petitioner's request to strike Respondents' cross-petition, and I find that the manner in which the petition to confirm the Award was presented is no impediment to ruling on the petition's merits.

II. Conclusion

Because no grounds exist upon which to vacate, modify, or correct the Award, I hereby grant the cross-petition to confirm the arbitration award, pursuant to 9 U.S.C. § 9, and I enter judgment for Respondents. I order the Clerk of Court to close this case.[2]

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2. I note that Petitioner in this action has filed a related action in this Court, and that a motion to dismiss is currently pending in that action. The Court will decide that motion in a subsequent opinion and order.

Appendix C

SO ORDERED:

New York, New York
June 10, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 14, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 4472 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Petitioners,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Respondents.

OPINION & ORDER

WOOD, U.S.D.J.

Petitioner Irene Halligan ("Petitioner") has filed a petition to vacate an arbitration award made after an arbitration proceeding brought by her husband, Theodore Halligan ("Mr. Halligan"), against Piper Jaffray, Inc. and Marvin Geisness ("Respondents"). For the following reasons, I deny the petition to vacate.

I. Background

Mr. Halligan was employed by Piper Jaffray, Inc. ("Piper") from 1973 to 1992 as an institutional equity salesperson.

O'Connell Aff. at ¶ 7. In January of 1993, Mr. Halligan filed a claim against Piper with the Equal Employment Opportunity Commission. *Id.* at ¶ 9. In October of 1993, Mr. Halligan instituted an arbitration proceeding against Piper and one of its employees, Marvin Geisness ("Geisness"), before the National Association of Securities Dealers (the "NASD"), alleging that he was discharged by Piper due to his age, in violation of both the Age Discrimination in Employment Act (the "ADEA") and certain rights at common law. The extensive hearings on Mr. Halligan's claims began in September of 1994. Mr. Halligan completed his own direct testimony, was cross-examined by Respondents, and began his own re-direct testimony before the hearing was postponed to allow other witnesses to testify.

In December of 1994, Mr. Halligan was diagnosed with a recurrence of oral cancer.[1] He thus did not appear at the final sessions of his own case, nor did he appear at the sessions of Respondents' case. In April of 1995, the parties stipulated, in light of Mr. Halligan's increasingly serious medical condition, that the brief re-direct testimony he had offered would be stricken from the record. Mr. Halligan died on October 9, 1995. He had designated his wife, Petitioner, as his sole Executrix.

Petitioner informed Mr. Halligan's counsel that she wished to continue with the arbitration proceeding on behalf of Mr. Halligan's estate. On October 16, 1995, Mr. Halligan's counsel notified the Panel that Petitioner had authorized counsel to

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1. Petitioner, by her attorney, states that this occurred in December 1995, O'Connell Aff. at ¶ 13, and that Mr. Halligan died in October 1996, O'Connell Aff. at ¶ 14. Given the undisputed fact that the arbitration concluded in October 1995, I note that counsel appears to mean, respectively, that Mr. Halligan was diagnosed with the recurrence of oral cancer in December 1994, and died in October 1995.

proceed with the arbitration. The arbitration continued. On March 19, 1995, the Panel made a final decision in the case, denying all of Mr. Halligan's claims. All told, the arbitration proceeding was extensive, comprised of twenty-six days of testimony and argument spanning a one year period. Evidence included more than 240 exhibits and the testimony of at least twenty-three witnesses. O'Connell Aff. at ¶ 12.

Petitioner now moves to vacate the Award because (1) the Panel acted in manifest disregard of the law; (2) the Panel was guilty of misconduct in refusing to hear evidence relevant to the controversy and through other misbehavior that prejudiced Mr. Halligan; (3) the Panel was partial; (4) the Award violated public policy; and (5) the arbitrators exceeded their authority. I address each argument in turn below.

II. Analysis

A. Standard of Review

A district court's authority to vacate an arbitration award is limited by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 10. Under the FAA, the court may vacate an arbitration award for the following reasons:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators are guilty of misconduct . . . in refusing to hear evidence pertinent and

> material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In addition, a district court may vacate an arbitration award on the basis of an arbitration panel's manifest disregard of the law. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260 (2d Cir. 1989), *quoting Merrill Lynch Pierce, Fenner, & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986). In order to maintain its well-established deference to arbitration as a favored method of dispute resolution between agreeing parties, the Second Circuit has narrowly interpreted the factors set out in § 10(a), as well as the manifest disregard of the law standard. *See Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir.), *cert. denied*, 112 S.Ct. 380, 116 L.Ed.2d 331 (1991); *Carte Blanche*, 888 F.2d at 265. Furthermore, the party moving to vacate an arbitration award bears the burden of proof. *See Roche v. Local 32-B2J Serv. Employees Int'l Union*, 755 F. Supp. 622, 624 (S.D.N.Y. 1991), *citing Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir. 1978).

B. Whether the Panel Demonstrated Manifest Disregard of the Law

This Court may vacate an arbitration award that was made with manifest disregard of the law. However, judicial inquiry under the manifest disregard standard is extremely limited.

Fahnestock, 935 F.2d at 516. In fact, in order for an error to constitute manifest disregard of the law, it must be "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Id.* (citations omitted). An error "must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator" to constitute manifest disregard of the law. *Merrill Lynch*, 808 F.2d at 933-34. The law that a petitioner alleges to have been disregarded "must be well-defined, explicit, and clearly applicable." *Id.* In addition, the term "manifest disregard" implies that the arbitration panel "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." Petitioner argues that the Panel manifestly disregarded the ADEA, under which Mr. Halligan brought his age discrimination claims against Piper. This argument is without merit.

Petitioner contends that the Panel demonstrated a manifest disregard of the ADEA because it ignored the parties' respective burdens of proof under the ADEA. In an ADEA claim, burdens of proof are the same as those for a Title VII action under 42 U.S.C. § 2000e et seq. *Bay v. Times Mirror Magazines*, 936 F.2d 112, 116 (2d Cir. 1991). In a traditional case, where a plaintiff cannot establish the existence of discrimination by direct evidence, a plaintiff must first establish only a *prima facie* case of discrimination by an employer. The employer must then produce a clear and reasonably specific explanation for the challenged employment-related decision, but the burden does not shift to the employer to show that its stated explanation was the true reason. *Bay*, 936 F.2d at 116 (2d Cir. 1991), *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 245, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989).

However, in a case where so-called "direct evidence" is available, courts need not adhere so strictly to this division of burdens of proof. Rather, when a plaintiff has established by direct evidence that an illegitimate factor has played a substantial or motivating role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same employment decision even if it had disregarded the illegitimate factor. However, a plaintiff always bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

Here, Petitioner contends that because Mr. Halligan based his claim against Piper on direct evidence of discrimination, Piper bore the burden of proof to show that his claim was without merit. Petitioner alleges that Piper failed to contradict the testimony of Mr. Halligan's witnesses, failed to raise an affirmative defense under the ADEA, and failed to show that Piper would have reached the same decision in the absence of age discrimination. For those reasons, Petitioner argues, the Panel's finding that no discrimination had occurred was made in manifest disregard of the law. In response, Respondents note that they did rebut testimony of Mr. Halligan's witnesses, directly establishing a credibility issue.

Petitioner's argument that the Panel manifestly disregarded the law is meritless for two distinct reasons. First, to show manifest disregard of the law, the Petitioner must demonstrate that the law was clear, that the Panel knew the law, and that the Panel ignored the law. Here, the determination of what constitutes "direct evidence" so that the respondent bears a

heavier burden is a difficult one to make. In addition, the record of the arbitration proceedings does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof. Second, in a situation such as this, where the Panel was faced with the task of evaluating conflicting witness testimony, and where it did not issue a written opinion,[2] I cannot conclude that the Panel did in fact disregard the parties' burdens of proof under the ADEA. There is support for Respondents' argument in the record, although there is also support for Petitioner's claim. Determining the credibility of conflicting witnesses is a key component of an arbitration panel's duty, and crediting one witness over another does not constitute manifest disregard of the law. *Fine v. Bear Stearns & Co., Inc.*, 765 F. Supp. 824, 828 (S.D.N.Y. 1991). This Court's role is not to second-guess the fact-finding done by the Panel. Because there is factual as well as legal support for the Panel's ultimate conclusion, I determine that the Panel did not manifestly disregard the law, and that the arbitration Award should not be vacated on that ground.

C. Whether the Panel Was Guilty of Misconduct or Evident Partiality

A district court may also vacate an arbitration award, pursuant to 9 U.S.C. § 10(a)(2) and (a)(3), respectively, when the arbitrators have demonstrated evident partiality or when

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2. It is well settled that an arbitration panel need not supply a written explanation for its award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). "Arbitrators are not required to provide the rationale for their award, and 'courts generally will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators.' " *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 121 (2d Cir. 1991).

the arbitrators are guilty of either misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced. Petitioner appears to rest both her claim of misconduct and her claim of evident partiality by the Panel on the same set of facts; I therefore consider these claims simultaneously.

Petitioner's misconduct and partiality claims rest on her allegations that the Panel improperly commented on Mr. Halligan's case, improperly limited Mr. Halligan's rebuttal case, and improperly required Mr. Halligan's counsel to identify rebuttal witnesses in advance. All of these arguments are without merit.

Petitioner relies on a sole comment by the Panel to support her allegations of partiality and misconduct:

> You know, under the rules . . . you don't have as a matter of right the right to rebuttal, a rebuttal case. You have a right of summation.
>
> Now, the panel has decided to give you or permit you the ability to put on a rebuttal case. But are you going to retry this whole case in rebuttal? We've heard almost everything.

TR. 4450-4451.[3] Far from commenting on the merits of the case, this statement by the Panel chairman, taken at its worst, can only indicate a desire by the Panel to restrict testimony to

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3. Citations to the transcript of the arbitration proceeding will be designated at "TR. __."

new information rather than allowing Mr. Halligan to offer redundant testimony. This is a proper motive for the Panel, especially in light of the nature of arbitration as an efficient way to resolve disputes. *See, e.g., Merrill Lynch*, 808 F.2d at 933-34. The Panel's comment, therefore, provides no basis for a finding that it was guilty of misconduct or impartiality.

With regard to Petitioner's argument that the restriction on rebuttal time was an act of misconduct by the Panel and demonstrated the Panel's partiality, I note that as the Panel explained, Mr. Halligan did not have an automatic right to rebuttal in the arbitration proceeding.[4] The Panel granted him rebuttal time, and was entirely within its authority to limit the time to ensure that testimony would be presented in an efficient manner. The Panel granted Mr. Halligan four hours of rebuttal time, and allowed Respondents four hours for cross-examination of rebuttal witnesses. Mr. Halligan's counsel called only two rebuttal witnesses.[5] Although Mr. Halligan's counsel may not have called additional rebuttal witnesses because of the restriction on time set by the Panel, I note that counsel herself stated on the record that any of the proposed rebuttal witnesses "could have been direct witnesses." TR. 4462. For these reasons, the Panel's time restriction did not result in prejudice to Mr. Halligan.

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4. Rebuttal was apparently allowed, when appropriate, under the parties' arbitration agreement. *See* Arbitration Procedures, O'Connell Aff. Ex. V.

5. Respondents note, and Petitioner does not argue to the contrary, that Petitioner apparently did not even use the full four hours allotted by the Panel. Resp. Mem. at 14.

Finally, I note that the Panel's requirement that Mr. Halligan's counsel identify all of her proposed rebuttal witnesses does not rise to the level of misconduct or partiality. Again, the Panel was acting within the scope of its authority to attempt to limit the scope of rebuttal testimony so as not to duplicate testimony already heard. *See, e.g., Grinnell Hous. Dev. Fund Corp. v. Local 32B032J, Serv. Employees Int'l Union*, 767 F.Supp. 63, 67(S.D.N.Y. 1991); *Warnes v. Harvic Int'l, Ltd.*, 1995 U.S. Dist. LEXIS 5844, at *10 (S.D.N.Y. 1995); *Fairchild & Co. v. Richmond F. & P.R. Co.*, 516 F.Supp. 1305, 1315 (D.D.C. 1981).

For the foregoing reasons, I determine that the Panel was not guilty of misconduct or evident partiality.

D. Whether the Award Violates Public Policy

Petitioner alleges, without elaboration, that the Award violates public policy by disregarding Piper's willful and deliberate violation of the ADEA. I construe this to be a further argument in support of Petitioner's allegation that the Panel evinced a manifest disregard of the law. Because I have already determined, for the reasons stated above, that the Panel did not demonstrate a manifest disregard of the law, I find no basis for determining that the Award violates public policy.

E. Whether the Panel Exceeded Its Authority

Pursuant to § 10 of the Arbitration Act, a court may vacate an award if the arbitrators exceeded their powers. . . ." 9 U.S.C. § 10(d). However, the Second Circuit has strictly limited the circumstances under which awards should be vacated:

Appendix D

> We have consistently accorded the narrowest readings to the Arbitration Act's authorization to vacate awards "[w]here the arbitrators exceeded their powers," 9 U.S.C. § 10(d) . . . .

Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 703 (2d Cir. 1978).

Petitioner here challenges the Panel's authority to adjudicate Mr. Halligan's claims after his death, citing New York Civil Practice Laws and Rules ("CPLR") § 7512, which provides that upon the death of a party who has agreed to submit to arbitration, "proceedings may be . . . continued upon the application of, or upon notice to, his executor." Petitioner was named executor in Mr. Halligan's will, but was not formerly designated as the executor until June 5, 1996. Therefore, Petitioner argues, her authorization to continue the arbitration on October 16, 1995 was not valid under CPLR § 7512 and the award must be vacated.

Petitioner discussed the arbitration with Mr. Halligan's counsel immediately after Mr. Halligan's death. Counsel asked whether Petitioner wished to proceed with the arbitration and Petitioner said that she did. Pet. Aff. at ¶ 4. On October 16, 1995, Mr. Halligan's counsel informed the Panel that Mr. Halligan had died and that "the estate represented by the executrix Irene Halligan has authorized our firm to continue this action in the name of the estate." TR. at 4537. Mr. Halligan's counsel, who is now Petitioner's counsel, has stated that she:

> had every reason to believe that a proper substitution had been effected through the offices of the attorney

> who had drawn Halligan's original will and obviously would not have proceeded with this arbitration if there was reason to believe that the arbitrator's powers had been terminated or that the hundreds of hours of legal time they had invested in this arbitration proceeding over two years could be nullified because they had no authority to act on behalf of the Estate.

O'Connell Aff. at ¶ 53. In effect, then, Petitioner seeks to benefit from a technical loophole — that is, Petitioner proceeded, as the executrix, in the arbitration, but now attempts to use the fact that she was not yet *officially* the executrix when she proceeded with the arbitration (although she *currently is* the executrix) to vacate the Award because it is unfavorable to her.

Strong policy concerns dictate that Petitioner's efforts to vacate the Award in this case are inappropriate. As one court has explained,

> To permit a party who has participated fully in the proceedings to later challenge his obligation to arbitrate would be manifestly unfair since the award is otherwise binding on the facts and the law. Having sought expeditious justice in a contractual forum, the losing party may not turn around and upset the arbitration award with a claim that its opponent had foregone its right to arbitration. The public policy favoring arbitration would be greatly undermined were the Court to sustain such a 'heads — I win, tails — you lose' objection.

Boston and Maine Corp. v. Illinois Central RR Co., 274 F. Supp. 257, 260 (S.D.N.Y. 1967). The particular facts of this case

compel the Court to conclude that Petitioner's inconsistent positions in this litigation and in the underlying arbitration are impermissible under the doctrine of equitable estoppel. *See In the Matter of the Petition of Transrol Navegacao S.A.*, 782 F. Supp. 848, 853 (S.D.N.Y. 1991).

Courts "agree that equitable estoppel may be applied to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding."[6] *Id. quoting Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).[7] In order to successfully argue that an opposing party is estopped from taking a particular position, a party must (1) have been an adverse party in the prior proceeding, (2) have acted in reliance on the opponent's prior position, (3) now face injury if a court were to permit his opponent to change positions. *Id., citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis*, 903 F.2d 109, 114 (2d Cir. 1990). Here, Respondents meet these criteria: they were an adverse party to the arbitration proceeding; they acted in reliance upon Petitioner's statement that the arbitration would go forward; and they will face injury if Petitioner is now allowed to nullify

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6. I note that although there is some question as to whether a party is precluded from taking inconsistent positions when the allegedly inconsistent party did not prevail in the first proceeding, *see Transrol*, 782 F. Supp. at 853, what is relevant here is that Petitioner was successful in representing to the Panel that she was the executrix of the estate, and successful in convincing the Panel to proceed with the arbitration upon her stated approval.

7. Although not technically testimony or a formal pleading, Petitioner's statement to the Panel acted as an authorization to continue the arbitration proceeding that is akin to a pleading substituting Petitioner for her husband in the arbitration proceeding.

the extensive and expensive arbitration proceedings after Respondent obtained a favorable award. For that reason, I now hold that the Award should not be vacated on the ground that the Panel exceeded its authority.

III. Conclusion

For the foregoing reasons, I hereby deny the petition to vacate the Award. I note that currently pending is an application by Respondents in this action to confirm the Award; I will address that application in a later order.

SO ORDERED:

New York, New York
April 14, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of October one thousand nine hundred and ninety-eight.

Dkt No: 97-7801

Halligan,

Appellant

v

Piper Jaffray, Inc.

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Piper Jaffray, Inc.

Appendix E

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX F — RELEVANT STATUTES

9 U.S.C. § 1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that

purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5

Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Appendix F

9 U.S.C. § 6

Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7

Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may

compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8

Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration

may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was

made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12

Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice

of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13

Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14

Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15

Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. § 16

Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.